80-1726

No. 80-

Office-Supreme Court, U.S.
FILED
MAR 4 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANK E. BRICE-NASH,
Petitioner,

vs.

ETTA M. BRICE-NASH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND THE COURT OF APPEALS OF THE STATE OF KANSAS

ROBERT L. TAYLOR
(Counsel of Record)
7 South Adams
Hutchinson, Kansas 67501
(316) 669-8164 or 669-8165
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

1. Whether rules of law established by case decision that take away from a legally adjudicated person, under all circumstances, the relief of divorce, or the right to dissolve a marriage, by precluding his or her guardian and the legally adjudicated person from commencing such a proceeding deny due process and equal protection of the law afforded by the 5th and 14th Amendments to the Constitution of the United States?

2. Whether the decision of the Kansas Appellate Courts give rise to an irrebuttable presumption which deprives Petitioner of due process and equal protection of the laws afforded by the 5th and 14th Amendments to the Constitution of the United States by establishing that a finding of incapacity in an earlier guardian proceeding is res judicata and conclusive on the issue of capacity in a subsequent divorce proceeding?

3. Whether the decision of the Kansas Appellate Courts establishes a classification of litigants, seeking the relief of divorce, which distinguishes, without a compelling state interest, the legally adjudicated from other classes that denies equal protection of the law to the legally adjudicated class, afforded by the 14th Amendment to the Constitution of the United States?

4. Whether the right to divorce is fundamental enough and of a sufficient "property" quality to be encompassed and protected by the 5th and 14th Amendments to the Constitution of the United States?

TABLE OF CONTENTS

Questions Presented for Review I

Table of Authorities IV

Opinion Below 1

Jurisdiction 2

Statement of the Case 2

Reason for Allowance of Writ 6

Argument I—The Decision of the Kansas Court of Appeals Exemplifies the Existing Rule of Law of a Majority of the States and Presents a Question of National Importance, for the First Time, Concerning the Right of the Legally Adjudicated Person to Seek the Relief of Divorce, Which Needs to Be Addressed by This Court to Determine Whether It Meets With the Constitutional Principles and Positions Previously Expressed by This Court, Dealing With the Right to Marry and Other Related Issues, and Whether a Denial of Rights of Due Process and Equal Protection Afforded by the 5th and 14th Amendments to the United States Constitution Is Presented 6

Conclusion 10

Appendix A—Decision of the Court of Appeals of the State of Kansas 1a

Appendix B—Judgment of the Supreme Court of the State of Kansas Denying Review 1b

Appendix C—Portions of Petitioner's Petition to Review (Pages 1, 2, 5 & 6) 1c

PRECEDING PAGE WAS BLANK

Table of Authorities

CASES

Boddie v. Connecticut, 91 S.Ct. 780, 401 U.S. 371 (1969) 7, 8

Cleveland Board of Education v. LaFleur, 414 U.S. 632, 39 L.Ed. 2d 52 (1974) 7-8

Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967) 7, 9

Prosser v. Prosser, 159 Kan. 651, 157 P. 2d 544 (1945) 8

Stanley v. Illinois, 405 U.S. 645, 31 L.Ed. 2d 551 (1972) 8

Talbot v. Wolf, 122 Kan. 1, 251 P. 438 (1926) 8

Vlandis v. Kline, 412 U.S. 441 (1973) 7

Zablacki v. Redhail, 54 L.Ed. 2d 618, 48 S.Ct. 673 (1978) 7, 8, 9

STATUTES

16 A AmJur 2d, *Constitutional Law*, Sec. 816, p. 978 8

No. 80-

In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANK E. BRICE-NASH,
Petitioner,

vs.

ETTA M. BRICE-NASH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND THE COURT OF APPEALS OF THE STATE OF KANSAS

The Petitioner, Frank E. Brice-Nash, by his attorney, Robert L. Taylor, respectfully prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the Court of Appeals and the Supreme Court of the State of Kansas on August 22, 1980 and November 7, 1980, respectively.

OPINION BELOW

The opinion of the Court of Appeals of the State of Kansas appears in the appendix hereto. The order denying review by the Supreme Court of the State of Kansas appears in the appendix hereto.

JURISDICTION

The judgment of the Kansas Court of Appeals was entered on August 22, 1980, affirming the trial court's decision. A timely Petition to Review to the Supreme Court of the State of Kansas was denied on November 7, 1980. On the 5th day of February, 1981, Mr. Justice Bryon K. White signed an order extending the time for filing this Petition for Certiorari to and including March 5, 1981. The jurisdiction of the Court is involved under Title 28, United States Code 1257(3).

STATEMENT OF THE CASE

This case arose from the commencement of a divorce proceeding by Petitioner, an 84-year-old man, on April 11, 1979, who had been adjudicated incapacitated, to acquire a divorce from his non-adjudicated spouse. Petitioner brought the action in his own name, even though he had had a guardian appointed for him in February of 1979, upon a petition initiated by his non-adjudicated spouse.

In the guardianship proceedings Petitioner was declared incapacitated under a state statute which permitted such a finding if a person was impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic drug addiction, chronic intoxication, or other causes to the extent that he or she lacked sufficient understanding or capacity to make or communicate responsible decisions concerning either his or her person or his or her estate.

The proceedings in which Petitioner was found to be incapacitated was conducted without a record which would factually demonstrate the basis for the finding of incapacity. The judgment of the court simply stated that Petitioner

was an incapacitated person who was unable to make or communicate responsible decisions concerning his person or estate.

In reaction to a motion by Petitioner to set forth findings of fact, the Court subsequently indicated in the proceedings that it had found that Petitioner suffered from cerebral arteriosclerosis and cerebral insufficiency; that Petitioner had declined to take medication, was neglectful of his person and dealt with his property inconsistently. Then the trial court concluded that by reason of physical and mental illnesses and/or deficiency Petitioner lacked sufficient understanding or capacity to make or communicate responsible decisions concerning his person and estate.

A psychiatrist's reports, submitted in the proceedings in conjunction with Petitioner's application to be restored to capacity, a few months after the initial finding of incapacity, established the first record of Petitioner's condition, and the psychiatrist concluded therein that Petitioner was not incompetent. The psychiatrist reported that Petitioner had been given a standard clinical interview, a Pfiefer Mental Status Questionnaire and EEG. That the EEG had shown some slowing of the brain waves; that the mental status questionnaire suggested mild to moderate impairment, or dementia. He then concluded that Petitioner did not seem to have the degree of impairment which is generally associated with incompetency, especially as to the type of decisions he had to make about his person and estate. He further stated that Petitioner knew the nature of his possession and the natural object of his bounty, and even though it would be his opinion that Petitioner could not operate a complicated business, he was fully capable of making judgments about where and with whom he wanted to live, and also who he wanted to receive his estate.

In the divorce proceedings commenced by Petitioner, the trial court assumed the position that it did not matter what Petitioner's level of competency or comprehension was, since the earlier adjudication of incapacity in the guardianship proceeding was binding upon the Court and conclusive as to the Petitioner's capacity to bring the action. As a result, Petitioner was never heard on the merits, and his divorce proceedings was summarily dismissed, without prejudice, upon a finding that Petitioner lacked legal capacity to bring the action.

Petitioner was not able to refile the divorce proceeding through his guardian, since the jurisdiction precludes a guardian from acquiring a divorce for his or her ward.

The judgment of the trial court was presented for timely review in the Court of Appeals of the State of Kansas. The trial court's decision was affirmed by a written opinion included herein as an appendix. Petitioner timely petitioned the highest court of the jurisdiction—Supreme Court of the State of Kansas—under Rules of Appellate Practice No. 8.03 for a discretionary review of the Court of Appeals' decision by a Petition for Review. The Petition for Review was denied, without a separate decision.

Petitioner sought review of three issues in his Petition for Review, one of which was whether the deprivation of the right to divorce would deny due process and equal protection of the laws under the 5th and 14th Amendments to the United States Constitution. Pages 1, 2, 5 and 6 of the Petition for Review have been included herein as an appendix.

Petitioner had raised, both orally and in written pleadings, in the trial court and the Court of Appeals the question whether the decision of the trial court would cause

the violation of federal, constitutional rights of due process and equal protection of the laws. The trial court in its order dismissing Petitioner's divorce proceeding did not address the issue by specifically ruling that federal, constitutional rights of Petitioner would or would not be violated, or denied by the Court's dismissal. The Court of Appeals, even though an extensive written decision was filed by the Court, copy of which has been included herein as an appendix, did not specifically address the issues of due process and equal protection arising because of the decision of the trial court, even though presented and argued by Petitioner's brief and oral arguments.

It was not until the Court of Appeals' decision was made and affirmed by the Kansas Supreme Court's refusal to review that a clear, federal, constitutional question became ripe concerning whether due process and equal protection would be denied by deprivation of the legally adjudicated's right to divorce in the state. The Court of Appeals' decision was the first decision of the jurisdiction which addressed the issue whether the legally adjudicated person could seek and acquire the relief of divorce in his own name. When the Court of Appeals decided that such a person could not, it was at this point that the legally adjudicated person in the state was totally foreclosed from seeking the relief of divorce, under all circumstances. Prior to the decision, the jurisdiction had only precluded the guardian from seeking the relief of divorce, but had not foreclosed, by rule of law, other avenues for the legally adjudicated to seek such relief.

As earlier indicated, and shown by included portions of Petitioner's Petition for Review, the issues presented for review by this Court were specifically formed and presented for the highest court of the state to address.

REASON FOR ALLOWANCE OF WRIT

ARGUMENT I

The Decision of the Kansas Court of Appeals Exemplifies the Existing Rule of Law of a Majority of the States and Presents a Question of National Importance, for the First Time, Concerning the Right of the Legally Adjudicated Person to Seek the Relief of Divorce, Which Needs to Be Addressed by This Court to Determine Whether It Meets With the Constitutional Principles and Positions Previously Expressed by This Court, Dealing With the Right to Marry and Other Related Issues, and Whether a Denial of Rights of Due Process and Equal Protection Afforded by the 5th and 14th Amendments to the United States Constitution Is Presented.

The decision of the Kansas Court of Appeals, when combined with the existing rule of law of the jurisdiction, followed by a majority of the states, which provides that a guardian cannot acquire the relief of divorce for his or her ward, forecloses relief from a marriage through divorce by a person who has been legally adjudicated incapacitated. As the rules of law now stand in the jurisdiction, because of the decision by the State's appellate courts, the legally adjudicated cannot, under any circumstances, seek and acquire the relief of divorce, as long as the status continues. If the status is permanent, so is the denial of the relief of divorce.

While previous decisions of this Court have recognized the State's right to regulate the marital relationship, it has also limited the State's police and regulatory powers by due process and equal protection considerations.

This Court has recognized the right to marry to be a fundamental right protected by due process and equal protection consideration. *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967); *Zablacki v. Redhail*, 54 L.Ed. 2d 618, 48 S.Ct. 673 (1978).

Divorce is an aspect of marriage and arguably brings into play the same constitutional considerations as expressed by this Court on the right to marry. In *Boddie v. Connecticut*, 91 S.Ct. 780, 401 U.S. 371 (1969), this Court gave the dissolution of marriage sufficient constitutional stature that it held a denial of access to the Court to acquire a divorce denied due process of law.

It is logical for this Court to extend its previous position that a person has a right to marry, protected by the United States Constitution, to include the right to dissolve any marriage created, for to do otherwise would be to half recognize the right to marry. The right to marry necessarily includes the right to dissolve it.

As with marriage, states through their police powers, have monopolized the means by which one may acquire relief from a marriage, or dissolve that relationship. This Court has indicated, in such a case, the state must afford access to the exclusive means under due process considerations. (*Boddie v. Connecticut*, supra).

The Court of Appeals' decision takes away from Petitioner access to the only means to dissolve his marriage. The decision does this in two ways: First it raises a constitutionally impermissible, irrebuttable presumption that Petitioner's previous adjudication of incapacity renders him permanently without capacity to commence a divorce proceeding, or consent to such a proceeding by his guardian. (*Vlandis v. Kline*, 412 U.S. 441 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 39 L. Ed. 2d 52

(1974); *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551 (1972)).

Secondly, it reaffirms the existing rule of law of the jurisdiction which precludes the guardian from seeking the relief of divorce for the ward. The combination of the two positions have the practical effect of taking away Petitioner's right to seek the relief of divorce.

The Kansas Court of Appeals' decision does not reflect a countervailing state interest of overriding significance to deprive Petitioner of the right of divorce. (*Zablacki v. Redhail*, supra); *Boddie v. Connecticut*, supra). The decision also suggests that the state has swept too broadly when it precludes all persons adjudged legally incapacitated from seeking the relief of divorce. (16 A AmJur 2d, *Constitutional Law*, Sec. 816, p. 978). This is readily seen when one considers that the Kansas statutes under which Petitioner was declared legally incapacitated is rather broad in its terms and could easily cover individuals well intact mentally, but physically incapacitated. The record does not establish that Petitioner did not enjoy sufficient mental capacity for the divorce proceeding, or to consent to it being brought by his guardian, and serves as a good example on the overbreath of the decision. Whatever state interest that can be identified, could be effectuated by less restrictive, constitutional mean, or means. The decision does not demonstrate that any state interest, or objective, could not be adequately protected in the divorce proceedings which Petitioner sought.

The ruling by the trial court and the Kansas Court of Appeals, in the instant case, distinguish an adjudicated incompetent from a non-adjudicated one by preventing the former from bringing a divorce action either by himself or through his guardian when the latter presumably could. (See *Prosser v. Prosser*, 159 Kan. 651, 157 P. 2d 544 (1945); *Talbot v. Wolf*, 122 Kan. 1, 251 P. 438 (1926)).

An equal protection analysis requires strict scrutiny of a classification, when it impermissibly interferes with the exercise of a fundamental right, to determine the state interests advanced by it. *Zablacki v. Redhail*, supra. Again, the Kansas decision does not reflect the state interest served by the separate classing of legally adjudicated incompetents from non-adjudicated ones, compelling enough in quality to justify, under equal protection considerations, the denial of the relief of divorce to the former. Moreover, the decision does not reflect, under existing divorce statutes and rules, a compelling state interest which justifies different treatment to the legally adjudicated as to other classes of persons seeking the relief of divorce.

Marriage, as has been recognized by this Court, is a fundamental part of the human relationship and serious ramifications flow from and arise because of the relationship. (*Loving v. Virginia*, supra). Equally important to the creation and continuation of the relationship of marriage is the ability to dissolve it, for besides the pursuit of happiness and life-liberty considerations, embodied in the respective provisions of the United States Constitution, "property" considerations are raised. Once the relationship of marriage is created, in the Kansas jurisdiction, as with all of the other jurisdictions, it affects and limits the ability of the person to deal with and control his or her property and otherwise pursue happiness, life and liberty. This is no less true with the legally adjudicated. Because of the marriage in question and the continuation of it, for instance, it precludes Petitioner from disposing of his property by will, to his desired heirs, other than his spouse, or otherwise dispose of real property without his spouse's consent. The continuation of the marriage, against the wishes of Petitioner, under Kansas law, as with a majority of the states, assures that Petitioner's spouse will be the sole heir to his property, if she survives him, or he is un-

able to divorce her. This deprives Petitioner of his right to control his property, and because of the late marriage to Respondent, as with hundreds of other persons throughout the nation, the parties do not share common heirs and it is not the desire of Petitioner that his spouse be sole heir to his property. Yet, on the other hand, these same restraints do not extend to non-adjudicated spouses, primarily because they retain the ability to discontinue the relationship by divorce.

Finally, Petitioner sees the Kansas Appellate Court's decision as being in error and inconsistent with previous positions taken by this Court on claims of federal rights under the 5th and 14th Amendments to the United States Constitution relating to marriage, life, liberty, property and the pursuit of happiness.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Kansas Court of Appeals and the Supreme Court of Kansas.

Respectfully submitted,

ROBERT L. TAYLOR
7 South Adams
Hutchinson, Kansas 67501
(316) 669-8164 or 669-8165
Attorney for Petitioner

Dated: March 3, 1981

APPENDIX

APPENDIX "A"

No. 80-51380-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

FRANK E. BRICE-NASH,
Appellant,

v.

ETTA M. BRICE-NASH,
Appellee.

SYLLABUS BY THE COURT

1.

The decision to divorce is a personal one, requiring a voluntary consent and volition on the part of the party bringing suit, which is incompatible with the ability of a person adjudicated "incapacitated" with respect to his person and estate as defined in K.S.A. 59-3002 (1).

2.

A person adjudicated "incapacitated" with respect to his person and estate does not possess the requisite capacity to file a divorce action.

3.

A person adjudicated "incapacitated" with respect to his person and estate cannot be deemed to have knowingly

verified the petition for divorce, as mandated by K.S.A. 1979 Supp. 60-1604.

4.

An adjudication of incapacity may not be subjected to collateral attack in a divorce action, as K.S.A. 59-3027 provides the sole procedure for restoration to capacity.

Appeal from Reno District Court; RICHARD J. ROME, associate judge. Opinion filed August 22, 1980. Affirmed.

Robert L. Taylor, of Hutchinson, for the appellant.

David L. Brown, of Weinlood, Cole, Shaffer & Brown, of Hutchinson, for the appellee.

Before FOTH, C.J., PARKS and SWINEHART, JJ.

SWINEHART, J.: This is an appeal from an order of the district court of Reno County dismissing the divorce action filed by the plaintiff, Frank E. Brice-Nash.

Plaintiff and defendant, Etta M. Brice-Nash, were married on July 19, 1975. Presently, the plaintiff is in his mid-eighties and the defendant is in her late seventies.

In late 1978, the defendant filed an application for the appointment of a guardian and conservator for the plaintiff. The case was filed in Reno County District Court, and on February 28, 1979, a hearing on the application was held. The court found in a journal entry filed on March 16, 1979, that the plaintiff, Frank E. Brice-Nash, "is an incapacitated person who is unable to make or communicate responsible decisions concerning his person or estate, for which reason a guardian should be appointed and a conservator should be appointed." The Hutchinson National Bank & Trust Company was appointed conservator and Bruce Kelly was appointed guardian.

On April 10, 1979, a motion was filed by the plaintiff through his attorney to alter or amend the judgment or to grant a new trial. Among other things, the motion stated that the pleadings and decision failed to notify the movant of the reasons for his alleged incapacity, thereby denying him due process, and also alleged that K.S.A. 59-3002 (1) was unconstitutional on the ground that it deprived him of his liberty to possess and enjoy his property. Further, the motion stated that the decision was contrary to the facts. In a memorandum opinion filed on April 24, 1979, the trial judge elaborated upon his decision, stating that Frank Brice-Nash suffered from cerebral arteriosclerosis and cerebral insufficiency. Further, he declined to take medication, was neglectful of his person and dealt with his property inconsistently. The court stated: "He is, by reason of physical and mental illness and/or deficiency, an incapacitated person as defined by K.S.A. 59-3002, as he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person and estate." The trial court therefore upheld its decision appointing a conservator and guardian.

In an opinion filed on July 2, 1979, the trial court responded to the motion to alter or amend filed by Frank E. Brice-Nash, stating that the only issue remaining under the motion was the constitutionality of K.S.A. 59-3002 (1). The court found that Brice-Nash had failed to sufficiently demonstrate that the statute was unconstitutional. No appeal was taken from the judgment of incapacity.

In a journal entry filed on July 23, 1979, the court refused to hear an application for restoration to capacity, filed by the plaintiff purusant to K.S.A. 59-3027. However, the court appointed a new guardian and conservator, Marguerite Sours.

On April 11, 1979, after the plaintiff had been adjudicated an incapacitated person, he filed an action for divorce, which is the subject of this appeal. In an opinion filed on July 2, 1979, the trial court dismissed the plaintiff's petition for divorce without prejudice on the ground that the plaintiff had been adjudicated an incapacitated person, and therefore lacked legal capacity to file the action. The court found that the determination that the plaintiff was an incapacitated person was binding upon it under the doctrine of res judicata and would so remain until restoration was accomplished. A journal entry embodying this memorandum decision was filed on July 20, 1979, and on August 14, 1979, the plaintiff filed his notice of appeal.

Plaintiff has raised four issues on appeal as follows: (1) Did the trial court err by concluding that the finding of incapacity made in the guardian and conservator proceedings was res judicata and conclusive as to capacity in the subsequent divorce proceedings? (2) Would the rule of *Birdzell v. Birdzell,* 33 Kan. 433, 6 Pac. 561 (1885), preclude a guardian and conservator from seeking the relief of divorce for a ward and conservatee, under all circumstances? (3) Should the rule of *Birdzell v. Birdzell* be abandoned? (4) Under what circumstances may a ward or conservatee act independently of his guardian and conservator?

Based upon the facts of this case, we need only decide the first issue raised by plaintiff, even though some of the arguments advanced by plaintiff with respect to the other three issues will be discussed in arriving at our decision.

The basic issue, then, is whether the trial court erred by dismissing without prejudice the petition for divorce filed by the plaintiff on the ground that the plaintiff lacked capacity to sue because he had been adjudicated an in-

capacitated person. The plaintiff contends that the question of his capacity to sue should have been determined by the district court during the course of the divorce proceedings. Consequently, he argues that the trial court erred by accepting the adjudication of his incapacity as conclusive and binding on it.

Capacity to sue is statutorily controlled by K.S.A. 60-217. K.S.A. 60-217 (*a*) provides that all actions must be prosecuted in the name of the real party in interest. However, a guardian or conservator, or another party authorized by statute, may sue in his or her own name without joining the party for whose benefit the action is brought under K.S.A. 60-217 (*c*), which reads:

> "Whenever a minor or incapacitated person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue [or] defend on behalf of the minor or incapacitated person. If a minor or incapacitated person does not have a duly appointed representative he or she may sue by his or her next friend or by a guardian *ad litem*. The court shall appoint a guardian *ad litem* for a minor or incapacitated person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incapacitated person."

In his commentary Judge Gard has stated:

> "The policy of the rule is to provide every infant or incompetent litigant with adequate representation, whether he be plaintiff or defendant. . . . Heretofore the right of an incompetent to sue by a next friend has been determined by court decision, as there was no statute on the subject." Gard's Kansas C. Civ. Proc. 2d § 60-217 (1979).

Accordingly, in any action involving an incapacitated person who is not represented by a guardian, conservator or the like, the court is under an affirmative duty to take whatever action is necessary to appoint a representative to assure that the rights of the incapacitated party are not abrogated due to lack of proper representation.

Not directly involving capacity to sue, but nevertheless relevant to the question, is K.S.A. 1979 Supp. 60-1604 (*a*) which requires that in divorce actions: "The truth of the allegations of any petition under this article must be verified by the plaintiff in person." *Cf.* K.S.A. 60-211 which states the general rule that unless otherwise provided by statute, a pleading shall be signed by at least one attorney of record for a party who is represented in an action. Any party who is not represented by an attorney must sign his or her own pleading.

These statutory provisions indicate that an incapacitated person may not file suit for divorce in his or her own name, and may be unable to evidence the requisite state of mind to verify the allegations in a divorce petition. The plaintiff asserts, however, that the capacity necessary to file a divorce petition and to have knowledge of the consequences of such an action is not necessarily the same as that required in other kinds of proceedings. Rather, in each case the trial court must determine anew whether a plaintiff has the necessary capacity to sue for divorce.

Before considering the plaintiff's position that the divorce court should decide whether one has the capacity to sue for divorce, we must consider the effect of plaintiff's adjudication of incapacity on the divorce proceeding. The probate code provides a comprehensive scheme for the determination of incapacity and the restoration to capacity. K.S.A. 59-3006 vests the district court with authority to appoint a guardian and/or a conservator for an individual

who is incapacitated and unable to make or communicate responsible decisions concerning his or her person or estate, respectively. The definitions of guardian, conservator and incapacitated person are all contained in K.S.A. 59-3002.

Especially important to this action is K.S.A. 59-3027, which sets forth the procedures to be followed for restoration to capacity. A verified application for restoration to capacity containing prescribed information may be filed by any ward or conservatee who has been declared an incapacitated person or by any person in the ward or conservatee's behalf. The district court may refuse to hear such an application for six months from either the date of the original adjudication of incapacity or for six months from the date of any hearing on an application for restoration. Under the statute, the court has the discretion to deny a hearing on the application for restoration.

K.S.A. 59-3028 (A) (1) provides that a guardianship or conservatorship shall terminate when a ward or conservatee is an incapacitated person and there is an order of the court entered after a finding that there is no further need of the guardianship and conservatorship. This suggests that there are times when a guardianship or conservatorship should terminate in situations other than a proceeding for restoration to capacity. However, K.S.A. 59-3028 (A) (3) also provides for a termination upon restoration to capacity. As the probate code contains the specific procedure provided by the legislature for restoration to capacity, this is a strong indication of legislative intent that it be the exclusive procedure to be used for restoration to capacity. Therefore, 59-3028 does not authorize the district court having jurisdiction over the divorce proceedings to make the necessary determination of capacity during the divorce proceedings.

Therefore, the only way that the plaintiff's capacity to sue could be questioned is in a proceeding for restoration to capacity. As a result, the judgment rendered under the provisions of the probate code, that the plaintiff was an incapacitated person requiring a guardian and conservator, is conclusive and binding on the trial court in the divorce action. Accordingly, the trial court properly determined that the plaintiff lacked the requisite capacity to file suit for divorce in his own name.

Plaintiff's reliance upon case law does not alter this conclusion. The plaintiff argues that a finding of incapacity is merely a rebuttable presumption of continued incapacity that may be refuted and ultimately rejected by a trial court in another proceeding. As authority for this proposition, he cites *In re Estate of Strohmeier,* 164 Kan. 675, 192 P.2d 181 (1948); *Toepffer v. Toepffer,* 151 Kan. 924, 101 P.2d 904 (1940); and *Fourth Nat'l Bank v. Diver,* 131 Kan. 113, 289 Pac. 446 (1930).

In *Toepffer v. Toepffre,* a wife sued for divorce from her husband of twenty years who had been adjudicated insane or of unsound mind thirty-one years prior to the suit. The husband's guardian ad litem defended in the action. The issue was not one of capacity to sue, but whether the defendant knew the nature and extent of his marital misconduct. The court relied upon the rule that an adjudication of insanity creates a presumption of continued insanity which may be rebutted by competent evidence of a subsequent sound mind at a given time (*Toepffer v. Toepffer,* 151 Kan. 924, Syl. ¶ 1). The court explicitly observed that no statute regarding restoration to capacity was in existence, unlike the situation today. Certainly *Toepffer* is distinguishable from the instant action, both as to its facts and to its relevant legal considerations.

In re Estate of Strohmeier, 164 Kan. 675, involved the question of the validity of a marriage to a man who had earlier been adjudicated insane. The court followed *Toepffer v. Toepffer,* 151 Kan. 924, Syl. ¶ 1, regarding the presumption of continued insanity.

In *Fourth Nat'l Bank v. Diver,* 131 Kan. 113, a guardian was allowed to bring an action to set aside a marriage entered into by his ward after the ward had been adjudicated feebleminded. The court allowed the suit because the guardian brought it as conservator of the ward's estate. In addition, there was a statute which authorized an action for annulment of a marriage brought by the party incapable of contracting the marriage. The court also acknowledged the continuing presumption rule regarding insanity. Like the two cases cited immediately above, *Diver* is distinguishable from the proceeding in question on several grounds; *e.g.,* there was statutory permission for an incapable party to have a marriage annulled, the guardian of the party's *estate* filed suit which was revived by the executor after the party's death, no question of the party's capacity to sue in his own name was directly addressed (although dicta based upon *Birdzell v. Birdzell,* 33 Kan. 433, suggests such a procedure would have been impossible.)

Other cases cited by plaintiff to support his argument that capacity is a question of fact to be examined in any proceeding where it may be a factor appear irrelevant to the question of capacity to sue for divorce, because they involve things such as testamentary capacity.

Birdzell v. Birdzell, 33 Kan. 433, perhaps the leading Kansas case concerning capacity to sue for divorce, rejected an attempt made by the guardian of an insane woman to sue for divorce. Although *Birdzell* is factually distinguishable from the instant action, portions of the

opinion are worth mentioning. The Supreme Court emphasized that a marriage could not be entered into without the free and voluntary consent of both parties. Nor could it be destroyed without the "free and voluntary consent" and the "active and affirmative volition" of the innocent party. The court declared that an insane person was incapable of such consent. Additionally, the decision to seek a divorce was a "personal matter resting solely with the injured party, and it requires an intelligent election on the part of such party to commence the proceedings, and such an election cannot be had from an insane person." 33 Kan. at 435, 436.

While the role of "fault" in a divorce action has changed since *Birdzell* (see K.S.A. 60-1606) and while "incapacitated" has been substituted for insane in guardian and conservator proceedings, the basic tenets described in the opinion, *i.e.*, that a decision to divorce is a personal one requiring full volition and consent of the one instituting the proceedings, are still valid. We conclude that as the plaintiff was declared incapacitated because he lacked sufficient understanding or capacity to make responsible decisions concerning his person and estate, he lacked the requisite capacity to file suit for divorce until such time as he was restored to capacity in accordance with the provisions of the probate code.

Judgment is affirmed.

APPENDIX "B"

No. 51,380

IN THE SUPREME COURT OF THE STATE OF KANSAS

Frank E. Brice-Nash, Appellant,

v.

Etta M. Brice-Nash, Appellee.

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.

DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date November 7, 1980

APPENDIX "C"

No. 51,380

IN THE COURT OF APPEALS OF THE
STATE OF KANSAS

FRANK E. BRICE-NASH
Appellant-Plaintiff

v.

ETTA M. BRICE-NASH
Appellee-Defendant

APPELLANT'S PETITION FOR REVIEW IN THE SUPREME COURT OF THE STATE OF KANSAS

Appeal From the District Court of Reno County, Kansas
The Honorable Richard J. Rome, Judge
District Court Case No. 79 D 172

I

PRAYER FOR REVIEW

COMES NOW, Appellant and prays the Supreme Court of the State of Kansas for review of the decision of the Court of Appeals of the State of Kansas, entered on the 22nd day of August, 1980.

II

STATEMENT OF THE ISSUES SOUGHT TO BE REVIEWED

1. Whether an adjudication of incapacity under the terms of K.S.A. 59-3002(1) is conclusively binding in a subsequent divorce proceeding on the issue of capacity.

2. Whether a perosn adjudicated incapacitated under the terms of K.S.A. 59-3002(1) and appointed a guardian is precluded from divorcing his spouse either in his/her own name or by his guardian.

3. Whether the deprivation of the right to divorce one's spouse, after an adjudication of incapacity under the terms of K.S.A. 59-3002(1), would deny due process and equal protection of the laws.

III

STATEMENT OF FACTS

This is a divorce proceeding, commenced by Appellant, in his own name, to acquire a divorce from his wife, Appellee. Prior to the commencement of the divorce proceeding, Appellant has been adjudicated incapacitated under the terms of K.S.A. 59-3002(1) and appointed a guardian and conservator.

The proceedings to appoint a guardian and conservator had been initiated by Appellant's wife, Appellee, wherein she sought an involuntary appointment of herself as guardian and conservator.

The record is silent on the question whether Appellant desired to divorce his wife, Appellee, prior to the commencement of the guardian and conservator proceeding, even though it does suggest the relationship and marriage of the parties were bad before the proceedings. The parties

had married on the 19th day of July, 1975, when Appellant was in his late seventies and Appellee was in her early seventies.

The guardian and conservator proceedings were held without the benefit of a record, and the only evidence of the extent of Appellant's incapacity is the trial court's conclusions in its Memorandum Opinion, copy of which is attached as Exhibit A.

The trial court dismissed Appellant's divorce proceedings, without a hearing on the merits, upon concluding that Appellant lacked legal capacity to maintain the proceedings and that the question of Appellant's capacity was conclusively determined in the prior guardian and conservator proceeding.

This proceeding addresses the finding and decision of the trial court and the Court of Appeals.

IV

ARGUMENTS AND AUTHORITY FOR REVIEW

Syllabus 4 by the Court of Appeals indicates that:

> "an adjudication of incapacity may not be subjected to collateral attack in a divorce action, as K.S.A. 59-3022 provides the sole procedure for restoration to capacity."

To treat the question of capacity in a divorce proceeding as a factual question, as with testamentary capacity, for example, should not be viewed as a collateral attack upon a previous adjudication of incapacity. The principles underlying collateral attacks are not applicable under the circumstances of this matter, as the Court of Appeals suggests by its findings. While capacity is an issue in the guardian and conservator proceedings, as well

as in the divorce proceeding, the considerations are not similar enough that the examination of the issue of capacity in a subsequent divorce proceeding should be viewed as a collateral attack.

The indication of 24 Am Jur 2d, *Divorce and Separation,* Sec. 273, p. 427, reflects that the question of capacity in a divorce proceeding is a vastly different issue from the question of capacity under the terms of K.S.A. 59-3002 (1), wherein it is indicated:

> "(I)f the Plaintiff in a divorce action reasonably understands the nature and purpose of the action and the effects of his acts with reference to it, and has the will to decide for himself whether or not the action should be brought, he has sufficient mental capacity to maintain the action."

The jurisdiction has not previously taken the position that findings of capacity in guardian and conservators is conclusive on the issue of capacity in other proceedings; nor has the consideration of capacity in a subsequent proceeding been viewed as a collateral attack. (See *Toepffer v. Toepffer,* 151 K. 924, 101 P. 2d 904; *In re Estate of Strohmeier,* 164 K. 675, 192 P. 2d 181; *Fourth National Bank v. Diver,* 131 K. 113, 289 P. 446.)

See also 68 A.L.R. *Insanity-Evidence-Adjudication,* p. 1309, for discussion on how other jurisdictions treat the issue of the conclusiveness of capacity findings.

Would it be a collateral attack in a proceeding, for example, to determine whether an adjudicated person possessed sufficient testamentary capacity to have made a valid will? The jurisdiction recognizes the right of the adjudication to make a will, if testamentary capacity exists. *In Re Estate of Hall,* 165 K. 465, 195 P. 2d 612; *In Re Estate of Perkins,* 210 K. 619, 627, 504 P. 2d 564. How would

the Court of Appeals distinguish the issue of capacity in such a case from that of a divorce proceeding, such that the rule of collateral attack would not apply under its analysis?

Given the broad language of K.S.A. 59-3002(1), a finding of incapacity, under its terms, should not be conclusive on the issue of capacity in other proceedings, to raise an irrebuttable presumption as to the issue of capacity under all other circumstances.

The rationale of the Court of Appeals is that a person, adjudicated incapacitated cannot be deemed to have knowingly verified the petition for divorce, expressed at Syllabus 3 by the court, is not very persuasive in determining the broad question whether a divorce action can be had by such a person. This position apparently ignores the role of the guardian in the affairs of the adjudicated. The verification of pleadings are procedural matters that can be fulfilled by the guardian.

Even if the rule of Birdzell that a guardian cannot acquire a divorce for his ward is valid, it would not preclude the guardian from fulfilling the procedural requirements of K.S.A. Chapter 60 relative to verified pleadings and other requirements which are necessary to get an issue of divorce before the court for consideration. It certainly would not be out of character for the guardian to serve in this role, for it is clearly recognized and established that a guardian and conservator may act as the representative of a ward in court proceedings and may commence proceedings on behalf of the ward. (See K.S.A. 60-217, 59-3018 and 59-3019).

To eliminate the guardian from playing any role in a divorce proceeding of a ward would excess the prohibitions and rationales of Birdzell. It would also be a rejection of what one sees transpiring in cases after Birdzell, such as *Fourth National Bank of Wichita v. Diver,* 131 K.

113, 284 P. 2d 446, wherein the guardian is allowed to commence an action to annul a marriage.

Birdzell does not express a sufficient policy or reason to justify depriving the ward of the right to divorce his/her spouse. The rule fashioned by Birdzell and carried forth by the Court of Appeals precludes, under all circumstances, irrespective of the conduct of the non-adjudicated spouse, the ward from divorcing. If the non-adjudicated spouse was openly committing an adulterous ground or creating other grounds for divorce, the adjudicated ward would have no remedy. There is simply no justification for a rule of law which would preclude a guardian from establishing grounds for a divorce based on the conduct of the non-adjudicated party, only, which would not involve the mental state of the adjudicated spouse.

The 14th Amendment to the U.S. Constitution provides that:

> "No state shall make or enforce any law which . . . deny to any person within its jurisdiction the equal protection of its laws."

If the law of the jurisdiction is that legally adjudicated incapacitated spouses are precluded from divorcing their non-adjudicated spouse while the latter would be free to divorce the former, the question arises whether such a rule of law would violate the equal protection clause.

When an equal protection question arises, the crucial question is whether there is a rational basis, or an appropriate governmental interest suitably furthered by the differential treatment. *Police Department of City of Chicago, v. Mosley,* 408 U.S. 92, 33 L.Ed.2d 212, 92 S.Ct. 2286.

At the present time, not only does the jurisdiction allow the non-adjudicated spouse to divorce the adjudicated

spouse, it establishes the adjudication as one of the grounds for divorce. K.S.A. 60-1601 reads, in relevant part, that:

> "The District Court may grant a decree of divorce . . . for any of the following causes: (3) . . . an adjudication of mental illness or mental incapacity by a court of competent jurisdiction, without discharge or restoration therefrom . . . for more than (3) years. . . ."

The case law of the jurisdiction also reflects that the jurisdiction allows the non-adjudicated spouse to divorce the adjudicated spouse. (See *Kessler v. Kessler,* 188 K. 255, 362 P. 2d 21).

The principles expressed in *Birdzell v. Birdzell,* 33 K. 433, 6 Pac. 561 (rehearing denied in 35 K. 638, 11 Pac. 907), reaffirmed by the Court of Appeals' decision, purports to express the jurisdiction's rationale for the rule of law earlier expressed. The question becomes whether the principles expressed in Birdzell justify the rule under equal protection consideration. The principles expressed in Birdzell, while eloquently stated by the court, have lost its persuasiveness by the passage of time and the changes in the divorce laws. More importantly, if the rationale expressed therein truly states an appropriate state interest, the prohibition against a divorce would have to equally extent to the non-adjudicated spouse.

How can the state, by way of Birdzell, contend that the dissolution of a marriage require the consent of the adjudicated spouse, which cannot be given because of his or her status, while at the same time permit the non-adjudicated spouse to divorce the adjudicated one. Wouldn't the same rules of consent to the dissolution be applicable to a proceedings initiated by the non-adjudicated spouse? Just because the divorce proceedings is initiated by the non-adjudicated spouse does not make the principles of Birdzell less applicable.

The rationale of Birdzell would only be valid, arguably, to defeat an equal protection contention if it applied equally to non-adjudicated spouse, to preclude the divorcing of the adjudicated spouse. The ultimate policy of Birdzell is to protect the adjudicated spouse in his or her marriage and his or her right of a personal election to dissolve the relationship. That policy, or state interest, is only served when, and if, the non-adjudicated spouse is also precluded from dissolving the marriage. Not to preclude the non-adjudicated spouse—the position assumed by the jurisdiction—denies equal protection, without compelling justification.

The equal protection question must share space and consideration with the question of whether due process would be denied by the same rule of law. Is due process denied when a mere finding of incapacity under the terms of K.S.A. 59-3002(1) raises an irrebuttable presumption of incapacity in all other matters?

The terms of K.S.A. 59-3002(1) are rather broad, and a finding of incapacity under its terms could say very little about the mental capacity of a party, as with Appellant. The question of capacity in a divorce proceeding addresses different concern than in a guardian and conservator proceedings, and while one may be incapacitated under the broad terms of K.S.A. 59-3002(1), his mental status may be more than adequate to meet the prerequisites for a divorce proceedings, more than sufficient to make an election and personal choice to divorce. To irrebuttably presume that one does not, because of a previous finding of incapacity, denies due process.

Respectfully submitted,

By /s/ Robert L. Taylor
Robert L. Taylor
Attorney for Appellant